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No. 15-446

In the

Supreme Court of the United States

CUOZZO SPEED TECHNOLOGIES, LLC,
Petitioner,

v.

MICHELLE K. LEE, UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND DIRECTOR, PATENT AND TRADEMARK OFFICE
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF THE INTELLECTUAL PROPERTY LAW ASSOCIATION OF CHICAGO AS AMICUS CURIAE ON PETITION FOR WRIT OF CERTIORARI IN SUPPORT OF PETITIONER

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I. INTEREST OF *AMICUS CURIAE*

The Intellectual Property Law Association of Chicago ("IPLAC") submits this brief as *amicus curiae* in support of Petitioners on the first question presented in the case.[1,2,3] Founded in 1884, the Intellectual Property Law Association of Chicago is a voluntary bar association of over 1,000 members who practice in the areas of patents, trademarks, copyrights, trade secrets and the legal issues they

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in any part or made a monetary contribution intended to fund preparation or submission of the brief, and no person other than the *amicus curiae*, its members, or its counsel, made such a monetary contribution.

[2] In addition to the required statement of footnote 1, IPLAC adds that after reasonable investigation, IPLAC believes that (a) no member of its Board or Amicus Committee who voted to prepare this brief, or any attorney in the law firm or corporation of such a member, represents a party to this litigation in this matter, (b) no representative of any party to this litigation participated in the authorship of this brief, and (c) no one other than IPLAC, or its members who authored this brief and their law firms or employers, made a monetary contribution to the preparation or submission of this brief.

[3] Pursuant to Supreme Court Rule 37.2, counsel of record received timely notice of the intent to file this brief under the Rule and consent was granted.

present. Located in Chicago, a principal forum for U.S. patent litigation, IPLAC is the country's oldest bar association devoted exclusively to intellectual property matters. Its members include attorneys in private and corporate practices before federal bars throughout the United States, as well as the U.S. Patent and Trademark Office and the U.S. Copyright Office. IPLAC represents both patent holders and other innovators in roughly equal measure. In litigation, IPLAC's members are split roughly equally between plaintiffs and defendants. As part of its central objectives, IPLAC is dedicated to aiding in the development of intellectual property law, especially in the federal courts.[4]

II. SUMMARY OF ARGUMENT

IPLAC supports Petitioners' request to grant *certiorari* to clarify that the same standard applies to claim construction regardless of forum. The 2011 Leahy-Smith America Invents Act ("AIA"), Pub. L. No. 112-29, 125 Stat. 284, was designed in large measure to improve the climate for investment and industrial activity. Its thrust is twofold: improving the quality of patents in the system and reducing unnecessary litigation costs. It attempts the former by removing invalid patents from enforceability. It attempts the latter by shifting patent validity disputes from the courts to the USPTO, the expert agency charged with granting or denying patents.

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[4] Although over 30 federal judges are honorary members of IPLAC, none of them was consulted or participated in any way regarding this brief.

The AIA therefore established a new post-grant adjudicatory process for challenging patent validity under Sections 102 and 103 of the Patent Act. To administer the process, the AIA created a new body called the Patent Trial and Appeal Board, or PTAB, staffed with administrative law judges. Located within the existing Patent and Trademark Office, the PTAB employs an adjudicative proceeding known as *inter partes* reviews, or IPR. IPR is intended as a less expensive surrogate for litigation. IPR has no relationship to the previous practice of patent re-examination within the USPTO.

As Petitioners have documented, IPRs to date have resulted in an unexpectedly high rate of cancellation of patent claims. Pet. Br. (I). One reason is presumably that the PTAB applies a broader standard of claim construction than the federal courts. *See* Paul R. Michel, *Why Rush Patent Reform?*, 7 LANDSLIDE 49, 51 (2015); Gregory Dolin, *Dubious Patent Reform*, 56 B.C. L. Rev. 881, 916 (2015). By construing claims more broadly than the courts, the PTAB necessarily considers a larger universe of prior art. It also heightens the impact of a given piece of art. This concomitantly increases the likelihood of finding a patent either anticipated under Section 102 or as obvious under Section 103.

The PTAB's claim construction standard for *inter partes* review is decidedly inconsistent with the standard used by federal courts. When construing claims in accordance with applicable law, federal courts must construe claims according to their plain and ordinary meaning. *Phillips* v. *AWH Corp.*, 415 F.3d 1303, 1312 (Fed. Cir. 2005) (en banc). An IPR Board, however, applies the "broadest reasonable construction" consistent with the specification.

Promoting the progress of the useful arts requires not only awarding valid patents but also a non-arbitrary system for challenging or upholding them. A non-arbitrary system requires that the standards for challenging or upholding validity be the same regardless of the chosen forum. To achieve its constitutional purpose, the patent system must also strike an appropriate balance between rights holders and other innovators. It cannot, and should not, attempt to tilt the playing field based on popular perceptions or political winds. IPLAC therefore supports Petitioners in urging this Court to grant *certiorari*. The Court should clarify that the proper standard for claim construction in assessing validity of an issued patent does not depend on whether the forum is a district court or the PTAB.

Nothing in the AIA, moreover, requires that IPR Boards employ a "broadest reasonable" claim construction. To the contrary, such construction is an anachronistic holdover from the USPTO's examination and re-examination processes. In those proceedings, the USPTO examines prior art and raises potential arguments against patentability using the "broadest reasonable interpretation" of the claims consistent with the patent's specification. The applicant then has the opportunity to amend its claims in view of the prior art to point out more particularly the invention claimed. In this give-and-take examinational process, a "broadest reasonable interpretation" makes perfect sense. In the context of the AIA's *inter partes* reviews it does not.

IPRs differ substantially from USPTO patent examinations and pre-AIA re-examinations. The process is adversarial, not examinational. Nor is the IPR Board authorized to conduct its own prior art

searches. The ability to amend claims is extremely limited. See 37 C.F.R. 42.121 (new claims limited to one-for-one replacement of existing claims; burden on patentee to demonstrate patentability of claims affirmatively before amendment allowed). In practice the ability to amend is all but illusory.

Thus, the IPR process lacks the back-and-forth of patent prosecution or re-examination. Rather, IPRs are adversarial and adjudicatory, as is district court litigation – merely streamlined. Its exclusive central features are (1) "non-notice" (fact-specific) pleading by challengers; (2) fact-specific responsive pleading by patent owners; (3) cross-examination of experts employed by affidavit, limited to seven hours, following the challenge and response; (4) a reply; and (5) a one hour lawyers' oral argument with exclusion of a "full" record. And fundamentally unlike patent examinations, IPRs involve only patents already granted. As such, the patent holder already owns a property right with established metes and bounds. Respect for that property right demands a fundamentally different kind of review from patent examination.

Both the AIA's IPR process and district court litigation are adjudicatory. The consistent claim construction standard of the Federal Circuit is "plain and ordinary meaning." *See generally* Sarnoff & Manzo, An Introduction to, Premises of, and Problems With Patent Claim Construction, in PATENT CLAIM CONSTRUCTION IN THE FEDERAL CIRCUIT 9 (E. Manzo ed. 2014). IPLAC therefore supports Petitioners in urging this Court to clarify that the litigation standard – "plain and ordinary meaning" – should apply in IPRs as well.

III. ARGUMENT

A. The Purpose of the AIA's *Inter Partes* Review Process Is to Promote Economic Efficiency, Not to Invalidate Patents.

The purpose of U. S. patent law is "to promote the Progress of Science and the Useful Arts ... " U.S. CONST., Art I, Sec, 8, cl. 8. The AIA is consistent with that purpose. It seeks to improve the climate for investment and industrial activity by improving the quality of patents and by reducing unnecessary litigation costs. *See* H. R. Rep. No. 112-98, pt. 1, at 39-40 (2011); *In re Cuozzo Speed Technologies, LLC*, 793 F.3d 1268, 1285 (Fed. Cir. 2015) (Newman, J., dissenting); Changes to Implement Transitional Program for Covered Business Method Patents, 77 Fed. Reg. 7080, 7081 (Feb. 10, 2012).

By their very nature, invalid patents exclude competitors from the marketplace who merely practice known art or obvious improvements. Excluding such competitors impedes the progress of the useful arts by permitting "owners" of invalid patents to monopolize technologies or to charge others monopoly prices to practice them.

At the same time, Congress has concluded that the existing patent litigation system unnecessarily imposes unneeded litigation and ancillary costs. *See* H.R. Rep. No. 112-98, Pt. 1, at 39-40 (2011). This frustrates the purpose of the Constitution's patent clause and undermines the value of the U. S. patent system.

By enacting the AIA, Congress has created a streamlined adjudicatory process – *inter partes*

review, or IPR. Central to the AIA's IPR scheme is having a reliable early indicator of a patent's quality. Thus, after a patent issues, the AIA provides for an *inter partes* review by technology-trained patent-savvy adjudicators. *See* 157 Cong. Rec. S7413 (Nov. 14, 2011) (Statement of Rep. Smith). This new *inter partes* review is distinct from pre-AIA patent re-examination procedures.

Under pre-existing law, a party could challenge an issued patent's validity through *inter partes* re-examination. *See* Cert. Pet. 2-3. But that process, unlike IPR, was examinational in nature. Specifically, re-examination allowed patent examiners to search for potentially invalidating prior art. Re-examination also freely permitted amendments by the patent owner.

In contrast, IPR is an adjudicatory proceeding. The USPTO Director serves as gate-keeper, while the parties present the arguments and art. A challenger to validity of an existing patent files a petition with the PTO, *see* 35 U.S.C. 311(a), limited to Section 102 (novelty) or 103 (obviousness) on the basis of prior art patents or printed publications. 35 U.S.C. 311(b). The petition must identify with particularity both the grounds and the evidence that challenge each claim. 35 U.S.C. 312(a)(3). The patentee may then file a preliminary response setting forth why the PTO should not institute *inter partes* review. 35 U.S.C. 313.

If the PTAB institutes IPR, the patentee may conduct limited discovery, including depositions of petitioner's declarants. *See, e.g.,* 35 U.S.C. 316(a)(5); 37 C.F.R. 42.51. The patentee may also respond with particularity to the petition and file supporting

affidavits or declarations. *See* 35 U.S.C. 316(a)(8); 37 C.F.R. 42.120. If the patentee responds, petitioner may conduct limited discovery, including depositions of the patentee's declarants, and may file a reply. See 35 U.S.C. 316(a)(5), (13); 37 C.F.R. 42.51. Either party may request an oral hearing. *See* 35 U.S.C. 316(a)(10); 37 C.F.R. 42.70. A panel of at least three administrative patent judges conducts the hearing. *See* 35 U.S.C. 6(c), 316(c). The proceeding excludes live witnesses and relies on the parties' paper submissions and attorney argument. *See* 35 U.S.C. 316(a)(10); 37 C.F.R. 42.70.

Patent examination of necessity considers patentable subject matter under Section 101. In contrast, IPR arguments are limited to Section 102 novelty and Section 103 obviousness. Prior art is limited to patents and printed publications. The IPR process streamlines and stages discovery and, absent good cause shown, requires a final written decision within twelve months. 35 U.S.C. 316(a)(11). IPR decisions of the PTAB are directly reviewable by the U. S. Court of Appeals for the Federal Circuit. 35 U.S.C. 141(c).

Absent good cause shown, motions to amend are limited to one per patent, only after conferring with the Board. 37 C.F.R. 42.121(a), (c). As in the case below, IPR Boards routinely deny such motions. *See, e.g., Idle Free Systems, Inc. v. Bergstrom, Inc.*, Case IPR2012-00027 (JL), 2013 WL 5947697, at *7 (June 11, 2013). Since the AIA took effect in September 2012, parties have filed over 3,400 IPR petitions. U.S. Patent and Trademark Office, Patent Trial and Appeal Board Statistics 8/31/2015, *available at* http://www.uspto.gov/sites/default/files/documents/2015-08-31%20PTAB.pdf. As of June 15, 2015, the

PTAB had allowed motions to amend in only four IPR proceedings. *See* "PTAB Allows Motion to Amend in IPR Challenging Neste Oil Patent," MANAGING INTELLECTUAL PROPERTY, June 15, 2015, *available at* http://www.finnegan.com/news/news-detail.aspx?news=d0d18aee-10e8-4511-bfa5-3b2962da1a39. In practice, then, the right to amend has been largely illusory.

In sum, to improve patent quality and to reduce litigation costs, the AIA created IPRs as "an inexpensive and speedy alternative to litigation." 157 Cong. Rec. S7413 (Nov. 14, 2011) (Statement of Rep. Smith). The process bears little, if any, resemblance to any previous proceedings within the USPTO. *Cf. Belden Inc. v. Berk-Tek LLC*, Nos. 2014-1574, 1576 (Fed. Cir. Nov. 5, 2015), slip. op. at 8-9 (description of process).

B. A Clear, Single Standard of PTAB Judicial Review is Required to Achieve the AIA's Goal of Economic Efficiency.

To achieve the AIA's aims, two adjudicative bodies reviewing the same patent's validity over the same prior art should reach the same result. Indeed, it would frustrate the intent of Congress and the purpose of the Constitution's patent clause to do otherwise. All adjudications therefore require a clear, single standard applicable to all such reviews, irrespective of the reviewing body.

As with patent infringement, the prerequisite for determining patent validity is claim construction. *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 996 n. 7 (Fed. Cir. 1995) (Mayer, J., concurring) ("A claim must be construed before determining its validity just as it is first construed before deciding

infringement"), *aff'd*, 517 U.S. 370 (1996); *see generally* Sarnoff & Manzo, An Introduction to, Premises of, and Problems With Patent Claim Construction, in PATENT CLAIM CONSTRUCTION IN THE FEDERAL CIRCUIT 9 (E. Manzo ed. 2014) ("Patent claims ... should be construed from an objective perspective of a [skilled artisan], based on what the applicant actually claimed, disclosed, and stated during the application process.") A patent's claims determine its metes and bounds and therefore what distinguishes it from the prior art. This establishes novelty; that is, what makes the patent neither anticipated under Section 102 nor obvious under Section103.

Without guidance from the Congress or this Court, the PTAB has been construing patent claims in IPRs under the standard PTO examiners use in examining patents prior to issue. *See, e.g., In Re Prater*, 415 F.2d 1393, 1405 (Ct. Cust. App. 1969) ("[C]laims yet unpatented are to be given the broadest reasonable interpretation consistent with the specification during the examination of a patent application since the applicant may then amend his claims, the thought being to reduce the possibility that, after the patent is granted, the claims may be interpreted as giving broader coverage than is justified."); *In re Buszard,* 504 F.3d 1364, 1366–67 (Fed. Cir. 2007) ("[T]he patent examiner and the applicant, in the give and take of rejection and response, work toward defining the metes and bounds of the invention to be patented."); *In re Zletz,* 893 F.2d 319, 322 (Fed. Cir. 1989) ("During patent prosecution is when claims can be amended, ambiguities should be recognized, scope and breadth of language explored, and clarification imposed.");

see generally U.S. Patent and Trademark Office, Manual of Patent Examining Procedure (9th ed., Mar. 2014) § 2111 (requiring application of the "broadest reasonable interpretation" to pending claims).

But district courts are bound by this Court's and Federal Circuit law to give claims their "plain and ordinary meaning." *Phillips*, 415 F.3d at 1312. The difference between the two is believed to be the reason for the alarmingly high rate of IPR claims cancellation to date. According to Petitioners, as high as 85% of all IPRs result in cancelling at least one claim. Pet. Br. (I).

At best, the application of two different standards invites confusion and forum-shopping. Because the IPR board is a surrogate for the district court, the two standards should be the same.

C. This Court Should Require the PTAB to Employ the Federal Circuit Claim Construction Standard of "Plain And Ordinary Meaning" in IPR Proceedings.

Congress could not be clearer that the IPR process should be a cost-effective surrogate for litigation. *In re Cuozzo Speed Technologies*, 793 F.3d at 1285 (Newman, J., dissenting). Both administrative adjudication under the AIA and district court adjudication are reviewable by the same court, namely the United States Court of Appeals for Federal Circuit. Although factual determinations underpinning the district court's claim construction may be entitled to deference, *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 574 U.S. ___ , 135 S. Ct. 831, 836 (2015), the Federal Circuit reviews all legal aspects of the claim construction *de novo*. That *de novo*

review, as does the district court's construction, requires giving the claims their plain and ordinary meaning. *Phillips,* 415 F.3d at 1312; *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996).

A valid patent must "distinctly claim" the inventor's invention. 35 U.S.C. § 112(b). A proper claim construction is therefore an essential element of promoting the progress of the useful arts. Specifically, a proper claim construction is central not only to an infringement analysis but also to a patent's validity. *Nautilus, Inc. v. Biosig Instruments, Inc.*, 572 U. S. ____, 134 S.Ct. 2120, 2128 (2014) (citing Sarnoff & Manzo, *supra*). While the former determines the scope of the patent holder's right to exclude, the latter determines the right to exclude at all.

Applying differing standards to a claim construction reached under an IPR from one reached by a district court would be incoherent. In and of itself, that would mean that the patent challenger's choice of forum – *i.e.,* whether to file IPR petition or a federal lawsuit – could be dispositive, up to and including the Federal Circuit level. More important, it would unacceptably permit differing tribunals charged by the same Congress to reach differing results on the same evidence. *In re Cuozzo Speed Technologies, LLC*, 793 F.3d at 1285 (Newman, J., dissenting).

A coherent approach consistent with the language and intent of the AIA would be to apply the claim construction standard with which district courts and the Federal Circuit are already familiar. That standard is the "plain and ordinary meaning" of the claim language to one of ordinary skill in the art.

Phillips, 415 F.3d at 1312. That standard is particularly appropriate under the AIA because of the limited opportunity for claim amendment. As even the majority below recognized in both its original and amended opinions, even the USPTO does not employ the "broadest reasonable interpretation" when re-examining the claims of an expired patent because the patentee is unable to amend the claims. *In re Cuozzo,* 793 F.3d at 1276 n.6 (citing *In re Rambus, Inc.,* 753 F.3d 1253, 1256 (Fed. Cir. 2014)).

Nothing in the AIA, moreover, requires the IPR Board to employ the "broadest reasonable interpretation" for claim construction. To the contrary, a simple panel majority of two judges below decided that Congress "impliedly approved" the rule merely by creating the new IPR proceedings. *Id.* at 1277.

As this Court has long recognized, however, "Congress' silence is just that – silence." *Cmty. For Creative Non-Violence v. Reid,* 490 U.S. 730, 749 (1989). Here, the purpose of Congress was to create a streamlined alternative to district court litigation. As with district court litigation, the process is adjudicative, reviewable by the Federal Circuit. If the goal is to reach the same result on claim constructions, then the standard should be the same.

Indeed, if the standard is not the same, claim construction approaches and the law directed to claim construction will become increasingly muddled. Inevitably, law developed and refined by the Federal Circuit when addressing district court claim constructions under the "plain and ordinary meaning" standard will diverge from that arising when the Federal Circuit reviews decisions based on

the "broadest reasonable construction" standard. This would be a disservice to the patent community and has no place in patent law and no grounding in the AIA.

IV. CONCLUSION

For the reasons above, the Court should grant *certiorari* to clarify that the proper standard for claim construction in IPR proceedings, as in district court litigation, is the "plain and ordinary meaning" of the claims.

Respectfully submitted,

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